IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 162 of 2020
[In the High Court at Suva Case No. HAC 309 of 2020]

BETWEEN

DINESH CHAND

Appellant

AND

STATE
Respondent

Coram	:	Prematilaka, RJA
Counsel	:	Mr. J. Niudamu for the Appellant
	:	Mr. R. Kumar for the Respondent
Date of Hearing	:	01 July 2022
Date of Ruling	:	04 July 2022

RULING

[1] The appellant had been charged in the High Court at Suva with a single count of attempted murder of Shakunthala Devi contrary to sections 44 and 237 of the Crimes Act No. 44 of 2009, committed on 22 August 2019 at Suva in the Central Division.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors and convicted the appellant for attempted murder. The appellant had been sentenced on 18 November 2020 to mandatory life imprisonment with a minimum term of 08 years of imprisonment to be served. A permanent DVRO for non-molestation and non-contact for the safety of Shakunthala Devi was also issued against the appellant.

[3] The appellant's appeal against conviction is timely. Both the appellant and the state had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The grounds of appeal urged on behalf of the appellant against conviction are as follows.

Ground 01

'That the learned Judge erred in law when he failed to give adequate direction to the assessors on the possibility of the appellant being convicted of a lesser offence of 'Act with intent to Cause Grievous Harm'.

Ground 02

'The conviction was unreasonable and cannot be supported by law and facts, since the State was not relieved from the burden to prove the elements of 'intention to kill' beyond reasonable doubt for the offence of attempted murder, thereby causing a grave miscarriage of justice'.

Ground 02

'That the summing-up may have lacked the adequate and proper direction regarding the issue of intention.'

[6] The evidence had revealed that the appellant had been married to the complainant, Shakunthala Devi (SD) but was separated from him at the time of the incident. On 22 August 2019, SD had visited the appellant's place to see the child. He had taken her to a doctor that evening as she was having a swollen toenail. SD stayed overnight at his place after returning from the doctor. According to SD, the appellant had tried to strangle her neck with a scarf when she was sleeping. She had also said that before she woke up, she felt someone trying to choke her by covering her face. Later that night she once again had felt pain on her neck. When SD woke up, she had seen the appellant right in front of her with a rod in his hand. The victim had suffered a life-threatening stab injury on her neck. The evidence had revealed that the appellant was angry for some reason before he committed this offence and there was a final domestic violence restraining order for non-molestation issued against the appellant for SD's safety. At the time of the offence there had been no one else inside the house apart from the complainant, appellant and their son.

[7] Medical evidence was that the complainant had received life-threatening injuries. Further the doctor had stated that major blood vessels supplying blood to the brain were where she sustained the injury. There had been bruises on the complainant's face compatible with choking.

[8] However, the appellant's position had been that he only pulled out the rod from the complainant's neck and denied that he stabbed her neck with it.

01st ground of Appeal

[9] The appellants' argument is that the trial judge had erred in law by failing to direct the assessors (or himself) on the count of 'Act with intent to Cause Grievous Harm' in the summing-up as requested by the State after the closing submissions. Both parties had filed written submissions on this issue and the trial judge had refused to do so and given detailed reasons in the judgment as to why he decided not to direct the assessors accordingly. Unsurprisingly, the respondent had conceded that leave to appeal should be granted on this ground of appeal.

[10] In a nutshell, the trial judge has determined that there is no provision to convict a person for a lesser offence or alternative offence [such as 'Act with intent to Cause Grievous Harm'] in the Crimes Act, 2009 (other than a minor offence) except in instances set out in section 162 of the Criminal Procedure Act, in contrast to section 169 of the repealedCriminal Procedure Code (CPC) which provided for convicting persons of offences for minor offences (with no reference, of course, to 'lesser offence' and 'alternative offence') other than those charged.

[11] The trial judge had stated that, however, Division 6 of the Criminal Procedure Act deals with convictions for offences other than those charged and there are three kinds of offences namely minor offences, lesser offences and alternative offences recognized therein.

[12] The corresponding section to section 169 of the CPC is section 160 of the Criminal Procedure Act, 2009 which states that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of theminor offencealthough he or she was not charged with it. As opposed to the repealed CPC, the Criminal Procedure Act defines 'minor offences' in section 2 as offences prescribed in the Minor Offences Act, 1971.

[13] Section 162(1) of the Criminal Procedure Act, 2009 states that where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction for a lesser or alternative offence (though not specifically charged) as itemized in the section.

[14] The trial judge had reasoned that while the Criminal Procedure Act refers to three kinds of offences *i.e.* minor offences, lesser offences and alternative offences, it provides a definition only for minor offences in section 2 of the Act. But the repealed CPC did not provide separate definition for 'minor offence' and therefore the courts could liberally resort to the said provision to convict persons for offences other than those charged without any limitation including lesser offences and alternative offences.

[15] Thus, the rationale of the trial judge appears to be that under the Criminal Procedure Act, 2009 he could convict an accused for a minor offence only if such offence comes under the Minor Offences Act, 1971 and not for any lesser or alternative offence as it was possible and could have been done under the old Criminal Procedure Code. 'Act with intent to Cause Grievous Harm' not being a minor offence though it may have been a lessor or alternative offence, the trial judge had felt that his hands were tied by the legislative provisions in Criminal Procedure Act, 2009 in directing the assessors on any lessor or alternative offence. The trial judge had called in help N S Bindra on Interpretation of Statutes [12thed. at p. 205] as well. Hence, the refusal to direct the assessors on 'Act with intent to Cause Grievous Harm'.

[16] The State submits that this approach is too restrictive and legalistic and a more liberal interpretation of the relevant provisions of the Criminal Procedure Act, 2009 should be adopted. Therefore, the legal issue to be resolved is whether an accused could be convicted for any lessor or alternative offence other than those set out under section 162(1) of the Criminal Procedure Act, 2009 and/or other than any minor offence set out section 2 as offences prescribed in the Minor Offences Act, 1971.

[17] The State seems to argue that there have been instances in the past where such directions have been given to assessors under the Criminal Procedure Act, 2009 [for e.g. **Shaheen v State** [2022] FJSC 17; CAV0015.2019 (28 April 2022) where the accused was charged with a single count of attempted murder contrary to sections 44 and 237 of the Crimes Act and the trial judge had directed the assessors on the alternative offence of 'Act with intent to Cause Grievous Harm'].

[18] Since, this raises a question of law only, no leave to appeal is required and the appeal should proceed to the full court for determination on this ground of appeal.

[19] However, I must place on record, that in my view even if the answer to the above question of law is in the affirmative it does not necessarily mean that on the proven facts the appellant should have been convicted for the offence of 'Act with intent to Cause Grievous Harm' which is an entirely a different issue of fact and law.

02nd ground of appeal

[20] This ground of appeal is based on the premises of the verdict being either 'unreasonable' or 'cannot be supported having regard to evidence' and there had been a 'miscarriage of justice'.

[21] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but should base its decision on the reading of the whole record.

[22] In considering whether a verdict isunreasonableorcannot be supported having regard to the evidence, the question for an appellate court is whether upon the whole of the evidenceit was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a

reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence **[Kumar v State**[2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)].

[23] If the Court comes to the conclusion that, on the whole of the facts, a reasonable assessors, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[24] If the appellate court concludes from its review of the record that conviction was inevitable it will warrant the conclusion that there has not been a substantial miscarriage of justice [vide **Naduva v State** (supra)]

[25] It is for the full court to read the entire record of proceedings and decide in this case and decide whether it was open to the assessors and the trial judge to find the appellant guilty of attempted murder (see **Pell v The Queen**[2020] HCA 12 and **M v The Queen**(1994) 181 CLR 487, 494) and whether the conviction for attempted murder was inevitable (vide **Baini v R**(2012) 246 CLR 469;[2012] HCA 59)].

03rd ground of appeal

[26] The appellant submits that the summing-up may have lacked adequate and proper direction regarding the issue of intention.

[28] On a perusal of the summing-up, I do not think that there is any perceivable inadequacy in the directions on intention (see paragraphs 20-28).

Order

1. Appeal may proceed to the full court on the first ground of appeal on a question of law only.

Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL